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In The

Supreme Court of the United States

UNITED STATES DEPARTMENT OF THE INTERIOR AND BUREAU OF INDIAN AFFAIRS,

Petitioners,

v.

KLAMATH WATER USERS PROTECTIVE ASSOCIATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF *AMICI CURIAE* OF THE UTE INDIAN TRIBE, BLACKFEET INDIAN TRIBE, SHOSHONE-PAIUTE INDIAN TRIBES AND SAN JUAN SOUTHERN PAIUTE TRIBE IN SUPPORT OF PETITIONERS

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IDENTITY AND INTEREST OF AMICI CURIAE[1]

The United States' Petition for Writ of *Certiorari* seeks this Court's review of the decision in *Klamath Water Users Protective Association v. Department of the Interior*, 189 F.3d 1034 (9th Cir. 1999) ("*Klamath*").[2] Therein, the Court of Appeals for the Ninth Circuit held that documents exchanged between the Klamath Basin Tribes and the United States acting as the Tribes' trustee are not protected from disclosure under Exemption 5 to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b)(5).

Amici include four Indian tribes, each of which is involved, together with the United States, in the negotiation or litigation of their water right claims. The Ute Indian Tribe of the Uintah and Ouray Reservation holds water rights in the Green River Basin, a sub-basin of the Colorado River. The Blackfeet Indian Tribe of the Blackfeet Reservation is located in Montana on the U.S.-Canadian border. It holds water rights in the Missouri River Basin and in the Hudson River Basin. The Shoshone Paiute Tribes of the Duck Valley Reservation have water rights in Nevada and Idaho from the Owyhee River within the Snake River Basin. The San Juan Southern

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[1] The parties' have written consent to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amici Curiae*, their members, or their counsel made a monetary contribution to the preparation and submission of this brief.

[2] The decision is included in the Petitioner's Appendix at 1a-30a. The unreported decision of the district court is found at Pet. App. at 31a-32a, and the magistrate's findings and recommendations are at Pet. App. at 33a-71a.

Paiute Tribe claims water rights in the Little Colorado River Basin within Arizona.

The water rights of each Tribe are subject to a pending basin-wide, state general stream adjudications. Each is currently negotiating with the respective States within the context of the adjudications to resolve the complex issues surrounding the nature and extent of the Tribes' water rights. In the course of negotiations, the United States, through the Bureau of Indian Affairs ("BIA"), has participated and worked with the Tribes in negotiations and in preparation for potential litigation. The BIA has requested and received from the Tribes extensive information including tribal views on the nature, extent and legal grounds in support of their water right claims, information similar to that provided by the Klamath Basin Tribes in their correspondence that was the subject of the *Klamath* case. The Tribes' documents were provided to the BIA with the understanding that the documents were confidential and privileged and would not be subject to public disclosure, especially to parties who oppose or seek to limit the extent of the Tribes' water rights. The Tribes maintain a significant interest in ensuring that the information exchanged between themselves and the federal agency acting as their trustee concerning a broad array of issues involved in the negotiation, litigation and settlement of their water right claims remains out of the reach of adversaries, except within traditional litigation discovery rules. As a result of *Klamath*, *amici's* previously exchanged *confidential* communications with their trustee regarding their water rights, as well as other natural resource issues, may now be subject to public disclosure. Moreover, any future exchange of information will be

strictly limited because of the very real threat of disclosure. The result will be a substantial chilling effect on the progress of negotiated settlements and coordination of litigation efforts.

STATEMENT OF THE CASE

A. Background

The United States holds Indian lands and their resources in trust, and is bound by an explicit duty to assist tribes in the protection, management and use of their lands and resources. *See United States v. Cherokee Nation*, 480 U.S. 700, 707 (1987); *United States v. Mitchell*, 463 U.S. 206, 225 (1983). The trust relationship requires the federal government to act in accordance with "the most exacting fiduciary standards" where any tribal interest is implicated. *See Seminole Nation v. United States*, 316 U.S. 286, 296-297 (1942); *Shoshone Tribe v. United States*, 299 U.S. 476, 497-498 (1937). To properly carry out its legally mandated trust responsibility, federal policy requires agencies to "establish regular and meaningful consultation and collaboration with Indian tribal governments in the development of regulatory practices on Federal matters that significantly or uniquely affect their communities," Exec. Order No. 13084, 63 Fed. Reg. 27655 (1998), and to keep the consultations confidential, *see* Department of the Interior, Department Manual: Part 512 American Indian and Native Alaskan Programs, Departmental Responsibilities for Indian Trust Resources § 2.4.B (1995).

The Department of the Interior ("Department"), through the Bureau of Reclamation, administers the Klamath Project. The Project irrigates lands in the

Klamath River Basin in Oregon and California. Four Klamath Basin Tribes, the Klamath Tribe in Oregon, and the Yurok, Hoopa Valley, and Karuk Tribes in California have water rights in the Basin. *Klamath*, 189 F.3d at 1035. In 1995, the Department announced it would develop a long-term plan for the operation of the Project (the "KPOP"). *Id.* To assist in fulfilling its trust obligation, and in development of the KPOP, the Department entered into a Memorandum of Agreement with the Klamath Basin Tribes formalizing the Tribes' roles as consultants to the Department. *Id.* at 1036. In accordance with the MOA, the BIA requested documents from the Tribes which were utilized to assure that as the Department deliberated and developed the KPOP, the Klamath Basin Tribes' rights and interests would be understood and protected, and that positions taken in the KPOP process were consistent with positions taken on behalf of the Klamath Tribe in the water right adjudication established by the State of Oregon. *Id.* at 1035-36. The KPOP will be finally developed and implemented by the Bureau of Reclamation following input, comment and review not only from the BIA and Tribes, but from other federal agencies, water users and other affected parties. *Id.* at 1047 (Hawkins, J., dissenting).

As noted above, the Department, as trustee, through a different agency, the BIA, also is required to assert the water right claims of the Klamath Tribe in a general stream adjudication proceeding before the Oregon Department of Water Resources. *Id.* at 1036. *See United States v. Oregon*, 44 F.3d 758 (9th Cir. 1994), *cert. denied*, 516 U.S. 943 (1995). *See also United States v. White Mountain Apache Tribe*, 784 F.2d 917, 920 (9th Cir. 1986). To fulfill its legal obligations, the BIA requested and

received documents prepared by the Tribe detailing the Klamath's claims to water in the Basin and possible legal theories to be used in the Oregon adjudication. *Klamath*, 189 F.3d at 1036. The information received from the Tribe was used by the BIA as it analyzed the facts and circumstances and ultimately determined what water right claims it would file in Oregon on behalf of the Tribe. *Id.* at 1041-42 (Hawkins, J. dissenting).

B. Nature and Disposition of the Proceedings Below

In 1996, the Klamath Water Users Protective Association ("Association")[3] filed a broadly stated FOIA request to the BIA "for documents provided to or received from the Klamath Basin Tribes pertaining to water resource issues in the Klamath River Basin." *Id.* at 1036. In response, the Association was provided with numerous documents, and only seven were withheld by the BIA pursuant to FOIA's Exemption 5. *Id.* That exemption protects from disclosure documents that are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency . . . ." 5 U.S.C. § 552(b)(5). Six of the seven documents were provided by the Tribes in response to requests by the government. They included documents detailing the Klamath Tribe's position on its water right claims in the ongoing Oregon general stream

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[3] The Association is a group of water users who are supplied with water from the Klamath Project and were involved in the public meetings regarding the KPOP. It had substantial disagreements with the positions taken by the Klamath Basin Tribes in the KPOP deliberative process. *See Klamath*, 189 F.3d at 1035.

adjudication, correspondence to the BIA from tribal attorneys for each of the Tribes expressing legal opinions on tribal resources and the extent of tribal water rights, and a memo to the BIA from a tribal biologist. *See Klamath*, 189 F.3d at 1041-42 (Hawkins, J., dissenting) (for a detailed description of the seven documents).

The Association brought suit in federal district court insisting it was entitled to view all seven of the withheld documents. The Ninth Circuit, in a 2-1 decision over a strong dissenting opinion by Justice Hawkins, reversed the district court and ordered disclosure of the seven documents. *Klamath*, 189 F.3d at 1039. The court refused to consider how the documents were employed in the agency decision making process, rejecting what it described as the District of Columbia Circuit's "expansive interpretation" of Exemption 5. *Id.* at 1038. Instead, the Ninth Circuit adopted a "direct interest" test which precludes application of Exemption 5 because the Klamath Basin Tribes provided advice (at the Department's request) on matters in which "the Tribes had their own interest and the communication presumptively served that interest." *Id.* As noted by the dissent, the result of this cursory test is, *ipso facto*, that the fiduciary relationship between Indian tribes and the United States is "a barrier to the application of the exemption . . . ." *Id.* at 1046. The result directly conflicts with the decision in *Public Citizen, Inc. v. Department of Justice*, 111 F.3d 168 (D.C. Cir. 1997), in which the court unequivocally rejected any notion that an outside consultant's interest in the subject matter before an agency automatically precludes application of Exemption 5.

SUMMARY OF ARGUMENT

The Ninth Circuit decision in *Klamath*, 189 F.3d 1034, directly conflicts with the test for applying Exemption 5 developed primarily by the Court of Appeals for the District of Columbia and most recently applied in *Public Citizen v. DOJ*, 111 F.3d 168. The Ninth Circuit decision, if not reviewed and reversed, will quash the vital exchange of confidential information between Indian tribes and the federal agencies entrusted with the responsibility to protect and represent their interests. Therefore, the Court should grant the United States' request and issue a Writ of *Certiorari* to review the *Klamath* decision.

REASONS FOR ISSUING THE WRIT

A. The Ninth Circuit "Direct Interest" Test Conflicts With the "Functional" Test Most Recently Applied by the D.C. Circuit in *Public Citizen*.

Public Citizen is the most recent in a long line of federal court decisions in which Exemption 5 has been applied to communications between outside consultants and federal agencies if "created for the purpose of aiding the agency's deliberative process." *Dow Jones & Co., Inc. v. Department of Justice*, 917 F.2d 571 (D.C. Cir. 1990). *Accord Formaldehyde Institute v. Dep't of Health and Human Services*, 889 F.2d 1118 (D.C. Cir. 1989); *CNA Financial Corp. v. Donovan*, 830 F.2d 1132 (D.C. Cir. 1987); *Ryan v. Department of Justice*, 617 F.2d 781 (D.C. Cir. 1979); *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971). *See also Brockway v. Department of Air Force*, 518 F.2d 1184 (8th Cir. 1975);

Wu v. National Endowment for Humanities, 460 F.2d 1030 (5th Cir. 1972). Exemption 5 was applied in *Public Citizen* to a FOIA request for correspondence between former Presidents and the Federal Archives, 111 F.3d 168, notwithstanding the fact that the former Presidents had a direct interest in the Archivist's ultimate determinations which made them potential adversaries. *Id.* at 171-72. Contrary to the majority view in *Klamath*, 189 F.3d at 1038, the facts in *Public Citizen* present precisely the same issues presented to the *Klamath* court, and that court's abandonment of the "functional" test in favor of a "direct interest" test directly conflicts with *Public Citizen*.

1. **The relationship between former Presidents and the Archivist in *Public Citizen* is virtually indistinguishable from the relationship between the Klamath Basin Tribes and the Department in *Klamath*.**

In *Public Citizen*, the court considered a FOIA request for correspondence submitted by former Presidents Reagan and Bush to the Federal Archives regarding restrictions upon the release of certain electronic communications produced during each Presidents' administration. 111 F.3d at 169-70. The Archivist must consult with a former President when considering allowing access to records which the President has designated restricted. The Archivist must ensure that he meets the duty to publically disclose the records as quickly and completely as possible, while protecting the interests of the President. *Id.* at 170. The court held that the communications

between the former Presidents and the Archivist regarding the release of restricted presidential communications were

> precisely the type that Exemption 5 was designed to protect. If it is to effectively deliberate, an agency may need or want to 'enlist the help of outside experts skilled at unraveling [the] knotty complexities' of 'problems outside their ken.' *CNA Financial Corp.*, 830 F.2d at 1162. The former President clearly qualifies as an expert on the implications of disclosure of Presidential records from his administration.

Id. at 171.

This Court is only too familiar with the "knotty complexities" of Indian water right claims, *see, e.g., Winters v. United States*, 207 U.S. 564 (1908); *Arizona v. California*, 373 U.S. 546 (1963), *decree entered*, 376 U.S. 340 (1964); *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983); *Nevada v. United States*, 463 U.S. 110 (1983). Indian tribes like the Klamath Basin Tribes possess a unique expertise regarding their water rights and other natural resources that is essential to the Department's deliberations any time those resources are affected or at issue. The Department must consult with affected tribes to enable it to effectively "unravel" the "knotty complexities" involved in allocating water and assuring both the protection of tribal interests and reconciliation of those interests with other parties' interests.

> Much as the Klamath Basin Tribes have natural resource rights which the Bureau and Department have a duty to reconcile with other parties' claims to water, the ex-President has "rights and privileges" in records that the Archivist has to

> reconcile with duties to the public to make records available. The mandated consideration that the Bureau and Department have to give to the Klamath Basin Tribes' claims virtually requires that they consult the Tribes, much as the Archivist consulted the ex-President, to seek their particular expertise concerning their rights, and how they wish to assert them in the KPOP and Oregon adjudication.

Klamath, 189 F.3d at 1045 (Hawkins, J., dissenting). The Klamath Basin Tribes, as did the ex-Presidents in *Public Citizen*, clearly qualify as outside experts with whom the Department is expected (indeed is legally required pursuant both to federal law and policy)[4] to consult and whose function as a consultant is an essential component of the agency's deliberative process protected under Exemption 5. To hold otherwise is directly contrary to the purposes of the Exemption and the test applied in *Public Citizen*.

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[4] The Department was explicitly bound to consult with the Klamath Basin Tribes pursuant to federal policy, *see* Exec. Order No. 13084, 63 Fed. Reg. 27655; DM Part 512 § 2.2, and agreement, *see* Memorandum of Agreement for the Government-to-Government Relationship in the Development of the Klamath Project Operations Plan (*cited* at *Klamath*, 111 F.3d at 1041). Moreover, the Department is legally obligated to consult with the Indian tribes pursuant to its responsibilities as a trustee. *See, e.g., U.S. v. Cherokee Nation*, 480 U.S. at 707. *See also Dow Jones*, 917 F.2d at 575 (recognizing *implicit* consultative relationships).

2. The Ninth Circuit's determination that the Tribes' interest in the matters under consideration by the Department negates their capacity to consult directly conflicts with the determination of that issue in *Public Citizen*.

In support of its conclusion that the Presidents' consultations were precisely the type to be protected by Exemption 5, the *Public Citizen* court focused on the role the disputed documents played in the agency's deliberative process, not the identity and interests of the document's author.

> While Public Citizen is doubtless right that a former President is not an agency under FOIA, [5 U.S.C.] §§ 551 (1), 552 (f), records of communications between an agency and outside consultants qualify as "intra-agency" for purposes of Exemption 5 if they have been "created for the purpose of aiding the agency's deliberative process." Dow Jones & Co., Inc. v. Department of Justice, 917 F.2d 571, 575 (D.C. Cir. 1990) (emphasis in original); CNA Financial Corp. v. Donovan, 830 F.2d 1132, 1161 (D.C. Cir. 1987). It is "irrelevant" whether the author of the documents is a "regular agency employee or a temporary consultant." Formaldehyde Institute v. Dept. of Health and Human Svcs., 889 F.2d 118, 1122 (D.C. Cir. 1989) (citations omitted).

Public Citizen v. DOJ, 111 F.3d at 170. *See also General Electric Company v. United States Environmental Protection Agency*, 18 F.Supp. 138 (D.Mass. 1998) (state agency qualified as outside consultant for purposes of Exemption 5). While FOIA's "dominant objective" may be "disclosure, not secrecy," *Klamath*, 189 F.3d 1037 (citations omitted),

> efficient government operations require open discussions among all government policy-makers and advisors, whether those giving advice are officially part of the agency or *are solicited to give advice only for specific projects.*

Ryan v. DOJ, 617 F.2d at 790 (emphasis added). Exemption 5 seeks to assure federal agency access to complete, accurate and candid information regardless of its source.

In reaching its determination that the correspondence from the ex-Presidents was aiding the Archivist's deliberative process and, therefore, protected from disclosure under Exemption 5, the court considered and rejected several challenges,[5] including the claim that the former Presidents' "distinct and independent interest" in determining the time frame and restrictions on the public disclosure of certain presidential records made them adversaries rather than consultants, thereby removing the documents from Exemption 5's purview. *Id.* at 171.[6] While

[5] The court described these challenges as "false dichotomies." *Id.* at 171.

[6] The court in *Public Citizen* noted that "the former President in this context can hardly be viewed as an ordinary private citizen," acknowledging his continuing power to assert executive privilege. 111 F.3d at 170. Although not able to avail themselves of executive privilege, Indian tribes have never been viewed as ordinary private citizens. Their unique political status has long been recognized by the judiciary, *see, e.g., Worcester v. Georgia*, 31 U.S. 515 (1832); *Morton v. Mancari*, 417 U.S. 535 (1974), and Congress, *see, e.g.*, 25 U.S.C. §§ 450a-450n (The Indian Self-Determination and Education Assistance Act). Moreover, their status as sovereigns further distinguishes Indian tribes from ordinary citizens or organizations. *See, e.g., Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509-10 (1991); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 511-12 (1940).

the former Presidents clearly advocated their positions regarding the release of documents which they had previously restricted, the *Public Citizen* court rejected any notion that "the consultative relationship is . . . mutually exclusive with any" other relationship, including that of advocate. *Id.* Moreover, the court concluded, "[t]he potential for an adversary relationship" between the ex-Presidents and the Archivist, "is not enough to negate one of consultation." *Id.* The Presidents' independent and direct interest in protecting certain communications from disclosure, in the court's view, did not preclude the Archivist from seeking their expertise in resolving issues related to those same communications. *Id.*[7] *See also Ryan v. DOJ*, 617 F.2d 781 (senators, who have a direct interest in selecting federal court judges, treated as outside consultants in responding to Justice Department questionnaire inquiring about procedures for selecting and recommending potential federal judge nominees).

The *Klamath* court turns the *Public Citizen* analysis on its head. The court refused to even consider whether the documents at issue aided the BIA or Department in their deliberations regarding the impact of the KPOP, and the basis and extent of water right claims to be filed on behalf of the Klamath Tribe in Oregon. *See Klamath*, 189 F.3d at 1045 (Hawkins, J., dissenting). Instead, it limited its inquiry solely to determining whether the Tribes had an interest in the matters about which the Department

[7] In fact, the *Public Citizen* court expressly relied upon the Archive's explanation of its need to consult with the former Presidents. *Id.*

sought advice. *Id.* at 1038. Contrary to *Public Citizen*, the Ninth Circuit found that any interest in the matter under agency consideration establishes a "direct interest" which *is* mutually exclusive, and cannot coincide with the role of consultant.

> While it is true that the Department requested the advice of the Tribes, the matters with respect to which it sought advice were matters in which the Tribes had their own interest and the communications presumptively served that interest, even if they incidentally benefitted the Department. Thus, we conclude . . . these documents do not qualify for exemption.

Id. In stark contrast to the D.C. Circuit's rejection of exclusivity, 111 F.3d at 171, the *Klamath* court concluded that a party's interest in the matters before an agency *precludes* its acting as a consultant to the agency.

To bolster its refusal to follow *Public Citizen* and its predecessors, the *Klamath* court highlighted what it claims is a distinguishing factor:

> [T]his case differs from *Public Citizen v. Department of Justice*, on which the Department relies, in that it presents not simply 'the potential for an adversary relationship' but a clear and present conflict with respect to the subject matter of the documents, which is for the Department to resolve.

189 F.3d at 1038. Once again, the court misreads *Public Citizen*, wherein the potential adversarial relationship was between the former Presidents and the agency itself. 111 F.3d at 171, *accord Klamath*, 189 F.3d at 1044 (Hawkins,

J., dissenting). In *Klamath*, a potential adversarial relationship existed between the Tribes and another party interested in the outcome of the KPOP and Oregon's general stream adjudication, the Association. 189 F.3d at 1038. In fact, the relationship between the Tribes and the Department was by no means adversarial; it was cooperative. Had the majority followed the analysis utilized in *Public Citizen*, it would have looked to the Department's explanation of its need to consult with the Tribes and recognized that rather than being adversaries, the Tribes were "sharing proposed strategies" with the Department and assisting BIA employees in "understand[ing] the Tribes' natural resource rights and formulat[ing] policy accordingly." *Klamath*, 189 F.3d at 1045 (Hawkins, J., dissenting). While the *Klamath* court also appears to recognize a potential for an adversarial relationship between the Tribes and Department within the KPOP process, *see Klamath*, 189 F.3d at 139, that potential was no greater than the potential in *Public Citizen* that the Presidents' relationship with Archivist would become adversarial. Such "potential" without "any movement in that direction", *Public Citizen v. DOJ*, 111 F.3d at 171, was insufficient to overcome the Klamath Basin Tribes' role as a consultant regarding their rights and interests in the Klamath River Basin.[8]

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[8] The *Klamath* court's reliance on *County of Madison v. United States Department of Justice*, 641 F.2d 1036 (1st Cir. 1981), is equally misplaced. There, the crucial factor in the decision not to apply Exemption 5 was that the documents involved related to litigation *between* the Oneida Nation and the United States, where they were "past and potential adversaries, not coopted colleagues." *Id.* at 1040 (the Nation had sued the United States in the Claims Court and was seeking to determine how a

The result of the Ninth Circuit's "direct interest" test undermines any ability of Indian tribes to confidentially share information regarding their natural resources with any federal agency. Nothing prepared by an Indian tribe for consideration by a federal agency can fall within the protective sphere of Exemption 5 because *Indian tribes always have a "direct interest" in their natural resources and federal agency actions affecting those resources.* The "direct interest" test abandons any consideration of the function the documents play within the agencies' deliberative process, *see Klamath,* 189 F.3d at 1044 (Hawkins, J., dissenting). It cripples the ability of Indian tribes to effectively consult with their trustee in a confidential forum. It undermines the ability of all federal agencies, particularly the BIA, to fulfill their legally mandated trust responsibilities. And, it impacts every party to any proceeding in which a federal agency is required to protect or assert tribal interests and is unable to confidentially communicate with the affected Indian tribe.

As pointed out by the dissent *in Klamath*: "[I]n an effort which marginally advances the cause of open government, [the majority] winds up punishing entities the

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settlement of that litigation might affect its land claim). Importantly, the documents were not provided at the request of the United States, but were initiated by the Nation in an effort to procure its own advantage. *Id.* at 1041-42 ("[T]he Oneidas approached the government with their own interests in mind."). The *County of Madison* court found this factor a "crucial" difference between its case and others (like *Klamath*) where the government requests information from outside consultants to aid in policy deliberations. *Id. But see Formaldehyde Institute,* 889 F.2d at 1124 (rejecting as "shortsighted" a claim that "there can be no Exemption 5 coverage because the outside reviews were not solicited by" the agency.).

government has a fiduciary duty to protect." 189 F.3d at 1039. Such a gross departure from the purposes of Exemption 5 and the underpinnings of the trust relationship demands issuance of the Writ of *Certiorari* and this Court's review.

3. This Court must resolve the two conflicting standards for determining when to apply Exemption 5 to FOIA's disclosure requirements.

Klamath and *Public Citizen* present two conflicting standards for evaluating the application of Exemption 5 which cannot be reconciled. *Public Citizen's* well-reasoned and consistently applied test developed over the past 25 or more years correctly focuses the inquiry on the purposes for which Exemption 5 was included in FOIA, while the result in *Klamath* stands as a barrier to an agency's need to make decisions with as much information as possible provided in a candid manner. By paying no heed to the purpose for which the document is required by the agency, the "direct interest" test conflicts with the purposes for which Exemption 5 was crafted. The Court should issue the Writ of *Certiorari* to resolve the conflicting standards for evaluating the applicability of Exemption 5, and to assure the continuing ability of federal agencies to confidentially consult with and fulfill their legal responsibilities to Indian tribes.

B. The *Klamath* Decision Has Broad Ramifications Throughout the Nation For Indian Tribes and For Those In Proceedings Involving or Affecting Tribal Interests.

As a consequence of its role as trustee, the BIA currently represents the interests of many Indian tribes in

numerous judicial and administrative proceedings, both formal and informal. These proceedings involve not only tribal water rights, but tribal rights in land, minerals, timber, fish and wildlife, and other resources. The BIA regularly seeks tribal expertise as it attempts to understand the rights and interests of the tribes it represents. Tribes are intimately familiar with their lands and resources that are held in trust for them by the United States. Federal agencies are often located hundreds of miles from tribal lands, and important decisions regarding them are often made by people without firsthand knowledge of the resources they have a duty to protect. Tribal input and expert advice are crucial when federal policy affects tribal resources.

Within the specific context of water rights, the *Klamath* decision will have a disastrous effect, and its impacts will be felt throughout almost every western state. Currently there are 18 ongoing proceedings in which the water rights of various Indian tribes are at issue. They involve most of the western states, including Arizona, California, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming, as well as many of the Nations' most important river systems including the Colorado, Missouri, Snake and Columbia Rivers. As in *Klamath*, the BIA prepares and submits claims for tribal water rights, and, perhaps most importantly, negotiates with and on behalf of tribes in settlement discussions.

The need for the BIA to communicate confidentially with those it represents cannot be overstated, and the impact of exposing these communications extends well beyond the agency decision making process. Without an exchange of complete and accurate information between

Indian tribes and their trustee, the likelihood of settling tribal claims and avoiding years upon years of costly litigation, *see, e.g., In re Rights to Use Water In Big Horn River*, 753 P.2d 76 (Wyo. 1988), *aff'd by an equally divided court, Wyoming v. United States*, 492 U.S. 406 (1989), becomes more remote. The fact that parties who oppose tribal claims or maintain opposing interests will have access to any documents exchanged between an Indian tribe and a federal agency will inevitably force tribes to stop sharing information to the detriment not only of Indian tribes and the United States, but ultimately to all those involved in any litigation, negotiations or settlement discussions involving tribal claims or interests.

Finally, the impact of the *Klamath* decision is not limited to water rights proceedings or to the western United States. Any exchange of documents between an Indian tribe and a federal agency regarding a tribe's resources, whether it be water, minerals, timber, fish and wildlife, or land will be subject to disclosure. Tribes throughout the country are affected. For example, in the east, most recently in New York, the United States represented the Seneca Nation and the Cayuga Indian Nation in land claims asserted against state and counties. In these land claim cases, the United States and Tribes, as they do in water right proceedings, worked together in a cooperative relationship to identify, prepare and pursue tribal aboriginal claims to land taken in violation of federal law, often hundreds of years ago. These claims are steeped in a complex historic and legal web that requires confidential communication and consultation between the United States and the affected tribes as they prepare and pursue their claims and strategy. Obviously, the Tribes have a very direct interest in the outcome of the land claim cases, and

the Ninth Circuit's "direct interest" test, if applied, would render cooperation between Indian tribes and their federal representatives virtually impossible.

CONCLUSION

For the reasons stated above, this Court should grant the petition for writ of *certiorari*.

Respectfully submitted,

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